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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BRIAN McNETT et al., Plaintiffs and Appellants, v. NETWORK MANAGEMENT GROUP, INC., Defendant and Respondent.	B224221 (Los Angeles County Super. Ct. No. BC330892)

APPEAL from a judgment of the Superior Court of Los Angeles County, William MacLaughlin, Judge. Affirmed.

Mazda Butler, Mark Mazda; Teuton, Loewy & Parker and Robert G. Loewy for Plaintiffs and Appellants.

Michael St. Denis, Donna Gin; Sheppard, Mullin, Richter & Hampton, Tracey A. Kennedy and Jonathan P. Barker for Defendant and Respondent.

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Appellants are supervisors (and members of a putative class) in casinos throughout California, who allege violations of California's wage and hour laws and allege unfair business practices against respondent, their employer. In a bench trial, the court found that appellants/class members were exempt executives and granted judgment in respondent's favor. In reaching this conclusion, the trial court found that the supervisors managed the casinos, "a customarily recognized department" of respondent as that phrase is used in the Wage Order the parties agree applies to the supervisors.

Appellants challenge the judgment, arguing (1) the trial court erred in finding the supervisors exempt because they were not the "top" employees in charge of the casinos and (2) the court's finding the supervisors were in charge of the casinos is not supported by substantial evidence. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Casinos in California are not allowed to provide banking services for games in which players play against the house, and they contract with companies to provide these banking services. Respondent Network Management Group, Inc. (Network) is in the business of providing banking services for casinos. Network provides the funds necessary for the games as well as the staff necessary to conduct the banking function in each casino.

During the relevant time period, Network staffed casinos in which it provided banking services as follows: associates (also known as bankers) were the lowest level employee and were responsible for playing the game at each table Network "banked." The number of associates varied, depending on the size of the casino. Associates monitored the dealer's conduct, monitored the chips on the table, and provided the funds necessary for the game. Supervisors (also referred to as lead associates) supervised the associates. Supervisors reported to a senior manager, who ultimately was responsible for Network's banking business in the casino. Most senior managers were responsible for only one casino, but some of the smaller casinos shared a senior manager. Senior managers spent approximately 20 hours a week in the casino and were always on call.

Supervisors worked 12-hour shifts three or four days a week. While there was some variation among the supervisors' responsibilities, they generally assigned associates to tables, scheduled associates, intervened with patrons if a dispute arose between an associate and a patron, helped improve associates' skill level, evaluated associates, gave associates performance reviews, and disciplined them when necessary. Supervisors were tasked with ensuring associates received their state-mandated breaks and lunch periods, and that associates worked in a safe environment. Supervisors were responsible for monetary transactions, including bringing and removing chips from a table. Overall, supervisors were responsible for Network's banking business on the casino floor.[1]

Supervisors enforced but did not set company policy. Supervisors did not have authority to sign checks on behalf of Network or negotiate contracts for Network. Supervisors did not receive financial reports, which were given to senior managers. Senior managers generally were responsible for terminating employees.

In a thorough statement of decision, the trial court found that each casino where Network provided banking services constituted a customarily recognized subdivision of Network. "Network conducts its actual business through separate contracts with individual casinos, at separate locations, which obligate it to provide the personnel and management of the . . . games at the contracting casino. Each casino has Network employees who are assigned on a regular basis to that one casino, which operates independently from the others. . . . This structure, with the business conducted at a fixed location with employees regularly assigned to that location, plus the method of individual operation, clearly satisfies the requirement of a customarily recognized subdivision."

The trial court also found that supervisors manage Network's banking business at each casino. "The Supervisors performed a broad spectrum of duties which was

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[1] Class representatives who testified contradicted some of this evidence. The trial court, however, found "the impartiality of [the class representatives] could be somewhat in doubt." In any event, we summarize the evidence in the light most favorable to the judgment. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1233, fn. 2.)

characterized by a number of the witnesses as managing the daily operations. . . . While the Supervisors were required to report various events and occurrences on a regular basis to Senior Managers and had limitations on their authority in personnel and company policy issues, such limitations do not preclude a finding that their duties constituted management."

Appellants appealed from the judgment in favor of Network.

DISCUSSION

In addition to the Labor Code, Wage Orders promulgated by the Industrial Welfare Commission govern wages, hours, and working conditions in California. (*Taylor v. United Parcel Service, Inc*. (2010) 190 Cal.App.4th 1001, 1009 (*Taylor*).) The parties agree Wage Order No. 10-2001 applies to this case. That Wage Order contains a multipronged test to determine whether a person is employed in an executive capacity and therefore exempt from overtime laws.[2] The Wage Order incorporates certain federal

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[2] Wage Order No. 10-2001 provides: "(1) Executive Exemption. A person employed in an executive capacity means any employee: [¶] (a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and [¶] (b) Who customarily and regularly directs the work of two or more other employees therein; and [¶] (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and [¶] (d) Who customarily and regularly exercises discretion and independent judgment; and [¶] (e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. [parts] 541.102, 541.104-111, and 541.15-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement. [¶] (f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time

regulations making relevant federal decisions interpreting the federal regulations in effect as of January 1, 2001, the effective date of the Wage Order. (*Taylor, supra*, at p. 1015.)

The assertion of the exemption is an affirmative defense, which an employer bears the burden of proving. (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794-795.) The exemption must be narrowly construed. (*Id.* at p. 794.) For purposes of this appeal, the parties agree that Network established the elements required to show the exemption with only one exception. The parties dispute whether supervisors' "duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof." Appellants do not dispute that the supervisors' responsibilities involved "management tasks," but they vigorously argue supervisors did not manage a customarily recognized department. According to appellants, "Employees who merely participate in management of a department, such as Lead Associates [(aka supervisors)], do not qualify for the executive exemption." Instead, appellants claim the "exempt executive must be in charge" and the exemption is "limited to the top executive in each department." We disagree.

1. Supervisors Qualify for the Executive Exemption in Wage Order No. 10-2001

Appellants' principal claim is that supervisors do not qualify for the exemption because the senior managers, not the supervisors, were in charge of the casinos.[3] We rejected this argument in *Taylor, supra,* 190 Cal.App.4th at page 1027, a case involving a similar Wage Order. In *Taylor*, we found "[n]othing in the plain language of Wage Order 9 indicates that the exemption applies only to the most senior management of an enterprise or the person with whom the proverbial 'buck' stops. To the contrary, the federal regulations instruct that an exempt executive need *not* be a final decision maker."

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employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week."

3 We consider the legal issues de novo. (*Ramirez v. Yosemite Water Co., Inc.*, *supra*, 20 Cal.4th at p. 794.)

(*Ibid*.) Although this case involves a different Wage Order, the reasoning of *Taylor* is equally applicable here.

Federal cases and federal regulations also support this conclusion. In *Adams v. United States* (Ct.Fed.Cl. 1999) 44 Fed.Cl. 772 (*Adams*), a border patrol station had a supervisory pyramid from bottom to top as follows, border patrol agents, supervisory border patrol agents, field operations supervisor, assistant patrol agent in charge, and a patrol agent in charge. (*Id*. at p. 774.) The court found that the supervisory patrol agents were not executives but the remaining positions were executive. (*Id*. at p. 785.) The reason the supervisory border patrol agents were not exempt is because the persons assigned to them "for purposes of field supervision [did] not . . . meet the requirement of a 'recognized organizational unit with a continuing function.' The assemblage of [border patrol agents] assigned to a particular [supervisory border patrol agent] on any day's shift cannot be referred to in any way that lasts beyond that day." (*Id*. at p. 778.) Thus, in *Adams* the supervisors did not supervise a recognized unit and therefore were not exempt. But, *Adams* made clear that multiple levels of supervisors in the same department could be exempt; the field operations supervisors, assistant patrol agent, and patrol agent were all exempt. Thus, *Adams* shows that multiple layers of employees may be exempt, not just the top employee.

Nothing in Wage Order No. 10-2001 or the relevant federal regulations prohibits multiple persons from being in charge of an enterprise or department. Title 29 of the Code of Federal Regulations former part 541.104(a), provided in pertinent part that an exempt employee "must be in charge of and have as his primary duty the management of a recognized unit which has a continuing function."[4] Appellants' interpretation of "in charge" to mean the "top" employee in charge is not supported by the plain language of

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[4] All part references are to Code of Federal Regulations as it existed in 2000.

Appellants also cite to parts 541.102 and 541.105, but those regulations do not further their argument that the court misapplied applicable legal requirements for the exemption. Appellants cite numerous additional cases, but none holds that only the top employee in a department can fall within the executive exemption.

part 541.104, which requires only that the employee be in charge, not that the employee be the top employee in charge. Former regulations distinguished between a person in charge and a person "who is in *sole* charge of an independent establishment or a physically separated branch establishment." (§ 541.113(e), italics added.) "In order to qualify for the exception [of being in sole charge,] the employee must ordinarily be in charge of all of the company activities at the location where he is employed. If he is in charge of only a portion of the company's activities at his location, then he cannot be said to be in sole charge of an independent establishment or a physically separated branch establishment." (*Ibid.*; see also *Cowan v. Treetop Enterprises Inc*. (M.D.Tenn. 1999) 120 F.Supp.2d 672, 694 [explaining that under the former regulation, there was a "'sole charge' exception" to managers who did not spend a specified amount of time performing managerial tasks].) Although part 541.113 was not incorporated into Wage Order No. 10-2001, its language demonstrates that "in charge" does not mean "in sole charge." Whereas only one person can be "in sole charge," multiple persons may be "in charge," depending on the particular circumstances of each case.

Finally, appellants argue that because the supervisors collectively managed the casinos, they were not each individually in charge of the casino. Appellants point out that one casino had 11 supervisors employed at the same time. They state that "[n]o single employee is 'in charge' under the regulations when he/she must collectively manage the same department with so many other people."

The existence of multiple supervisors in each casino does not prohibit finding the supervisors exempt. (*Baldwin v. Trailer Inns, Inc*. (9th Cir. 2001) 266 F.3d 1104, 1112 [upholding summary judgment finding that comanagers of trailer park were exempt].) The disputed portion of Wage Order No. 10-2001 required only that the supervisors "duties and responsibilities involve the management of . . . a customarily recognized department or subdivision . . . ." Thus, under the Wage Order, the trial court was required to consider whether the casinos were customarily recognized departments. The Wage Order did not require the court to determine whether the supervisors managed a department that no other person also managed. In *Adams*, a case discussed earlier, there

were several field operation supervisors in each station and all of them were exempt. (*Adams, supra,* 44 Fed.Cl. at pp. 774, 778.) In a related case, the circuit court upheld the finding that even though more than one field operation supervisor worked on the same shift and even though they did not always supervise the same employees, the field operations supervisors were exempt from federal overtime requirements. (*Adams v. United States* (2004) 350 F.3d 1216, 1224-1225.)

Appellant improperly relies on authority finding a single executive exempt to conclude that only a single executive can be exempt. *Scherer v. Compass Group, Inc.*, (W.D.Wis. 2004) 340 F.Supp.2d 942, 954, in which the court considered only a single executive in charge of a department, does not stand for the proposition that only one person in each department may be exempt. Similarly, in *Sutton v. Engineered Systems, Inc.* (8th Cir. 1979) 598 F.2d 1134, 1136, the court considered whether a plaintiff, who was in charge of a construction project, was in charge of a customarily recognized department. (*Id*. at p. 1137.) The court found the sole employee in charge was exempt, but did not hold that only a sole employee in charge could be exempt. In *Lyles v. K-Mart Corp.* (M.D.Fl. 1981) 519 F.Supp. 756, 757, the court made a factual finding that "each assistant manager was in charge of one zone" and was "solely responsible for the activities within his zone." The court, however, did not hold that only one employee in each department may be exempt. Appellants do not show the trial court erred in finding the supervisors exempt, even though there were multiple supervisors in some of the casinos and even though the supervisors reported to the senior manager, who was ultimately responsible for Network's banking function in the casinos.

2. Substantial Evidence Supports the Trial Court's Finding That Supervisors Were in Charge of the Casinos

Appellants argue that senior managers, not supervisors, were in charge of the casinos, and the trial court's contrary finding is not supported by substantial evidence. For the executive exemption to apply, there must be evidence the supervisors were "in charge" rather than merely participating in management. (§ 541.104.)

Here, the court found as follows: "Above all else, the evidence established that the primary focus of the Supervisors' duties was the management and supervision of the associates in the performance of their duties and that the supervisors regularly performed that function throughout the supervisors' shifts. Senior Managers, who are in charge of the casinos, but devote a great majority of their time to broader issues than the actual operations, are considered to be on duty 24 hours a day, 7 days a week, but spend only a small portion of their time at the casinos and then, only rarely, would be involved in the regular daily operations." The court continued: "By the very nature of Network's structure and organization, the Supervisors were the only employees in the position to be able to supervise the Associates and the daily business operations because Senior Managers are infrequently on the premises and leave supervision of the actual operations to the Supervisors."

We review a trial court's factual findings for substantial evidence, and conclude substantial evidence supported the trial court's finding that supervisors were in charge of the casinos. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.)[5] Supervisors were responsible for all gaming operations in the casino. There was evidence that supervisors created the schedules for associates and assigned associates to particular games, trained associates, gave associate reviews, disciplined associates, and intervened in disputes between associates and casino patrons. Supervisors were responsible for monetary transactions and for the banking business on the casino floor.

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5 Citing *Ramirez v. Yosemite Water Co., Inc., supra*, 20 Cal.4th at pages 802-803, appellants argue that we should consider this issue de novo because the "trial court's finding in this case that Class members involved in managing a department is based on a mistaken, pro-employer interpretation of the executive exemption." We do not agree with appellants' premise that the trial court's finding was tainted by an incorrect interpretation of the exemption.

Although there were some discrepancies between the number of supervisors in the various casinos and although there was testimony that for a brief period of time Network operated without supervisors, appellants do not distinguish between casinos. We therefore do not consider each casino separately.

They were responsible for ensuring a safe environment and for enforcing company policy. These tasks fall within the definition of management in part 541.102, as appellants acknowledge. More importantly, the evidence supports the inference that the supervisors were in charge of the casinos, not merely participating or assisting the senior manager.

That supervisors were responsible only when they were physically present in the casino does not negate their exempt status. That supervisors did not perform every duty of an exempt employee does not show that the trial court erred in finding them exempt. (See *Taylor, supra*, 190 Cal.App.4th at p. 1021 ["There is no requirement that in order to be properly classified, an executive must carry out every conceivable function that can be classified as an exempt duty"].) Nor is there a requirement that the supervisors be a "final decision maker." (*Id.* at p. 1027.)[6]

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.

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[6] Respondent filed a cross-appeal regarding attorney fees. It withdrew its cross-appeal prior to oral argument. Therefore, appellants' motion to dismiss the cross-appeal is moot.